

REVISIONS TO SECURITY AND FREEDOM ENHANCEMENT (SAFE) ACT OF 2005

The Security and Freedom Enhancement (SAFE) Act has been revised to address some valid concerns and important developments, including a recent decision by a federal judge holding a key PATRIOT Act authority unconstitutional. Additionally, the original version of the SAFE Act created sunsets for several flawed PATRIOT Act provisions to ensure that Congress would reconsider them prior to reauthorization. Now that the reauthorization debate has begun, the SAFE Act has been revised to fix these provisions rather than sunset them.

Section 2 – FISA Roving Wiretaps

This section is unchanged.

Section 3 – “Sneak & Peek” Searches

Some have argued that the SAFE Act would not allow a delayed notification or “sneak and peek” search where there is reason to believe that giving notice of the search might lead to intimidation of potential witnesses. Some have claimed that allowing additional delays in notice of only seven days is unduly burdensome because it would force a federal prosecutor to return to court every seven days to seek an extension.

In response, the SAFE Act has been revised to expand the circumstances in which delayed notice is allowed to include intimidation of potential witnesses, and allow additional delays in notice of up to 21 days (the initial delay would remain seven days). The SAFE Act provision that would sunset the sneak and peek authority has been eliminated.

Section 4 – FISA Orders for Library and Other Personal Records

A federal court recently held that the criminal National Security Letter provision (discussed below) is unconstitutional because the recipient of such a letter cannot challenge it in court and is subject to a permanent, unchallengeable, nondisclosure requirement. This rationale also applies to a FISA records order, the recipient of which cannot challenge the order and is subject to a gag order. Some have argued that a FISA records order is analogous to a grand jury subpoena, but, in the case of a grand jury subpoena, the recipient can challenge the subpoena, the government must make a showing of need before a gag order is imposed, and the recipient can challenge such a gag order.

As the former Chief of the FBI’s National Security Law Unit has argued, in order to protect against abuse, Congress should require 1) notice to the target of a FISA records order if the government seeks to use the tangible things obtained from the order in a subsequent proceeding, e.g., a trial, and 2) an opportunity for the target to challenge the use of those things. Other FISA authorities (wiretaps, physical searches, pen/traps) have such notice and challenge provisions. Given the secrecy and ex parte nature of FISA, due process demands this procedural protection.

Therefore, the SAFE Act has been revised to give the recipient of a FISA order the right to challenge the order, require a showing by the government that a gag order is necessary, place a time limit on the gag order (which could be extended by the court), give a recipient the right to

challenge the gag order, give notice to the target of a FISA order if the government seeks to use the tangible things obtained in a subsequent proceeding, and give the target an opportunity to challenge the use of those things.

Section 5 – National Security Letters

As explained above, a federal court recently found the criminal NSL provision unconstitutional because of the “unparalleled level of secrecy and coercion” resulting from a recipient’s inability to challenge the NSL and the NSL’s permanent, unchallengeable, nondisclosure requirement. In that case, the Justice Department argued that the opportunity to challenge an NSL is already implicitly permitted by the NSL statute (the court rejected this argument). Congress should make this protection explicit.

The rationale for revising the FISA records authority to include a notice and challenge provision applies with equal force to NSLs in light of the secrecy and lack of due process entailed in the NSL process.

The SAFE Act has been revised to require that the records sought relate to a suspected terrorist or spy, give the recipient of an NSL the right to challenge the letter and its nondisclosure requirement, place a time limit on the NSL gag order (which could be extended by the court), give notice to the target of an NSL if the government seeks to use the records obtained from the NSL in a subsequent proceeding, and give the target an opportunity to challenge the use of those records. The SAFE Act provision sunsetting the expanded NSL authority has been eliminated.

Section 6 – Pen Registers and Trap and Trace Devices

Law enforcement have long been permitted to use surveillance devices known as pen registers and trap and trace devices (pen/traps) to gather transactional (non-content) information about wire (telephone) communications. The government need only certify that the information likely to be gathered is relevant to an ongoing criminal investigation. On the other hand, content information can only be obtained with a wiretap order, which requires a showing of probable cause.

The PATRIOT Act expanded the authority to obtain pen/traps to electronic communications (e.g., e-mail and the Internet). For electronic communications, the line between content and non-content information is much less clear than it is for telephone communications. Moreover, there is a great deal more non-content information available about electronic communications. Finally, Americans are using the Internet to conduct much more of their daily business than in the past, generating vast new quantities of information that are subject to pen/trap surveillance.

The revised SAFE Act would retain the PATRIOT Act’s expansion of pen/trap authority to electronic communications (the SAFE Act provision sunsetting this expansion has been eliminated). In recognition of the vast amount of sensitive information that law enforcement can now access, the SAFE Act would create modest safeguards allowing increased Congressional, public, and judicial oversight of pen/traps. The SAFE Act would require additional Congressional reporting, require delayed notice to individuals who are targets of pen/traps (pen/trap targets currently receive no notice, unlike the targets of wiretaps), and slightly raise the

burden of proof for obtaining pen/trap orders. Under the current standard, the government need only certify that the information sought is relevant, a certification that a judge has no power to question. Under the revised standard, the government would have show to facts indicating a reason to believe that the information sought is relevant.

Section 7 – Domestic Terrorism Definition

The PATRIOT Act's overbroad definition of domestic terrorism could include acts of civil disobedience by political organizations. While civil disobedience is and should be illegal, it is not necessarily terrorism. The SAFE Act would limit the qualifying offenses for domestic terrorism to those constituting a federal crime of terrorism, instead of any federal or state crime, as is currently the case.

Section 8 – FISA Public Reporting

The PATRIOT Act made it much easier for law enforcement to use FISA to conduct secret surveillance on American citizens regardless of whether they are suspected of involvement in terrorism or espionage and whether the primary purpose of the underlying investigation is intelligence gathering. In 2003, the most recent year for which statistics are available, the number of FISA wiretaps exceeded the number of criminal wiretaps for the first time since FISA became law. It is important for Congress and the American people to learn more about how the FBI is using FISA since the passage of the PATRIOT Act. Therefore, the SAFE Act would require increased public reporting on the use of FISA.